MOTION FILED JAN 31 1963

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1962

No. 705

First Congregational Church and Society of Burlington, Iowa, First Congregational Church of Pontiac, Michigan, First Congregational Church of Wauwatosa, Wisconsin, Mayfair Congregational Church of Toledo, Ohio, Malcolm K. Burton, Bruce H. Masselink, Angus MacDonald, Harry R. Butman, Gladys T. Kennedy, Norman S. McKendrick, Roy W. Abel, Richard H. Plock, John G. Pryor and Frederick Grabow, suing on behalf of themselves and all others similarly situated,

Petitioners,

against

EVANGELICAL AND REFORMED CHURCH, John T. Beach, as Treasurer and a member of The General Council of the Congregational Christian Churches of the United States, The Board of Home Missions of the Congregational and Christian Churches, The American Missionary Association, The Congregational Home Missionary Society, The Congregational Church Building Society, The Congregational Board of Ministerial Relief, Congregational Education Society, Congregational Publishing Society, The Annuity Fund for Congregational Ministers, Retirement Fund for Lay Workers, The Corporation for the General Council of the Congregational Christian Churches of the United States, and American Board of Commissioners for Foreign Missions,

Respondents,

John T. Beach, as Treasurer of the National Council of Congregational Churches and Fred Hoskins and James E. Wagner, as co-Presidents of the United Church of Christ,

Added Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

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HAMMERSMITH-KORTMEYER CO.
MILWAUKEE

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Now comes the undersigned and moves the Court for leave to file a brief amicus curiae in support of the Pe-

tition for a Writ of Certiorari heretofore filed herein by petitioners, and represents to the Court as follows, to-wit:

1. That he is a duly enrolled member of the Bar of this Honorable Court and a member of the firm of Robertson, Hoebreckx & Davis, Milwaukee, Wisconsin; that said firm has been retained by the plaintiffs in an action entitled Hoffman, et al. v. Emley, et al., pending in the Circuit Court in and for Waukesha County, State of Wisconsin; that the gravamen of the Complaint in said action is that the plaintiffs are bringing a class action representing the "faithful minority" membership of the First Congregational Church of Oconomowoc, Wisconsin; that the defendants represent the majority members of the said church who by virtue of a simple majority vote determined to change said church's adherence from one of Congregational polity to a new presbyterial type church denominated United Church of Christ; plaintiffs seek declaratory, injunctive and accounting remedies.

2. That the Answer filed by the defendants in the foregoing action alleges as an affirmative defense that the decision of the New York Court of Appeals under the title of "Cadman Memorial Congregational Society of Brooklyn, et al. v. Helen Kenyon," reported in 306 N.W. 151, 166 NE(2d) 481, and the judgment of the District Court for the Southern District of New York in the action *sub judice* are binding on all members of Congregational Churches wherever located and that plaintiffs in the Oconomowoc Church action are precluded from further prosecuting their action.

3. That said Oconomowoc Church action is presently at issue; that your movant's clients have a direct and real interest in whether the Petition for Writ of Certiorari is granted in the action *sub judice*.

4. That tendered herewith is the brief statement of the undersigned, which, if this motion is granted, we request be filed herein.

5. That copies of this Motion and tendered Brief Statement have been served upon counsel of record for all parties and the consent of the petitioner for the writ herein obtained.

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STATEMENT ON BEHALF OF ARTHUR L. HOFFMAN, ROBERT GILPATRICK, EDWARD KEENEY, FRANK T. LANG, FRANK CASE, ARNOLD BOETTCHER, and JOHN HARMON, Amicus Curiae.

Arthur L. Hoffman, Robert Gilpatrick, Edward Keeney, Frank T. Lange, Frank Case, Arnold Boettcher and John Harmon respectfully wish to advise this Court that they have commenced, as plaintiffs, an action in the Circuit Court in and for Waukesha County, Wisconsin, against Philip W. Emley, Chas. Block, John H. Lepke, Richard E. Stiles, Malcolm E. Quay, Dr. Donald E. Notbohm and Robert Egerman. The Complaint on file therein states that plaintiffs are members of First Congregational Church of Oconomowoc, Wisconsin, a voluntary association, organized in 1841. The defendants therein were the officers of said association and in control of the property of said church at the time a vote was taken on April 30, 1961, when by a simple majority of the members present at such meeting it was voted to approve the Constitution of United Church of Christ and thereby become "a basic unit" of said Church. The plaintiffs further allege in such action that the United Church of Christ is not Congregational in polity and practice, but is in fact presbyterial. During a discovery examination of the defendant Rev. John H. Lepke, the minister of the Oconomowoc church, an admission was extracted that at least in one instance the practice of United Church of Christ will not be, fundamentally, consistent with and true to 400 years history and traditional practice of Congregational churches.

In reply to plaintiffs' Complaint, defendants have claimed that the decision of *Cadman Memorial Con-*

gregational Society of Brooklyn, et al. v. Kenyon, etc., 306 N.Y. 151, 116 NE(2d) 481, and the decision of the Second Circuit Court of Appeals below, 305 F(2d) 724, are binding upon plaintiffs and foreclose them from further prosecuting their claim under the doctrines *res judicata* and collateral estoppel.

At such time as this affirmative defense and plea in bar comes on for hearing, plaintiffs in the Oconomowoc case will attempt to show that *Cadman* is not binding on them because, *inter alia*, the document under judicial determination in that case was The Basis of Union and Interpretations and that the ultimate decision in that case rested upon a determined defect in parties before the Court; that *Cadman* was not a decision *on the merits* generally, or relevant to a suit where there is schism in a local congregation as to whether the faithful minority are entitled to control the church's property or not, and as to the other rights and legal relations of such a minority.

These friends of the Court wish to respectfully point out that United Church of Christ will undoubtedly continue to press in this Wisconsin action, as it is doing in local actions in other states, the alleged binding effect of *Cadman*, and the decisions of the New York Federal Courts in the case *sub judice*, upon any and all actions brought by minority members faithful to Congregational practice and polity. Unless the writ is granted in this action reviewing the decisions of the Federal courts below and a clarification is obtained authoritatively stating the limited scope and effect of the *Cadman* judgment, especially in respect to any claim of *res judicata* or collateral estoppel based thereon, it would appear that the merits of the controversy raised in the case at bar will

never be adjudicated. It also appears that local Congregational churches may find themselves foreclosed from adjudicating real controversies which have developed as to the civil and property rights and legal relations and as to which faction of the membership in entitled to the temporal property of the church. Such a result would constitute a denial of due process of law and of justice. We accordingly respectfully urge, in the interest of justice, the granting of the writ prayed for by plaintiffs-appellants. The questions involved are of great and widespread importance.

Respectfully submitted,

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